

No. 19-6898

ORIGINAL

IN THE SUPREME COURT OF THE
UNITED STATES

October term, 2019-2020

Supreme Court, U.S.
FILED

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DEMICKO BILLIE THOMAS,

Pro Se Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT

DEMICKO BILLIE THOMAS Pro Se Petitioner
Stafford Creek Correctional Center
191 Constantine Way
Aberdeen, Washington 98520

QUESTIONS PRESENTED

WHETHER THE WASHINGTON STATE SUPREME COURT'S
DISAPPROVING OF THIS COURT'S DECISION IN
MUSACCHIO V. UNITED STATES, _____ U.S. _____,
136 S.Ct. 709 (2016), IS BINDING ON THIS
COURT AND THE NINTH CIRCUIT COURT OF APPEALS.

WHETHER THE FOURTEENTH AMENDMENT REQUIRES EACH
AND EVERY ELEMENT OF A CHARGED OFFENSE TO BE
PROVEN BEYOND A REASONABLE DOUBT.

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FOR THE NINTH CIRCUIT

Petitioner Demicko Billie Thomas, respectfully prays that a writ of Certiorari issue to review the decision of the Ninth Circuit Court of Appeals, entered on August 30, 2019.

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OPINIONS BELOW

The Washington State Court of Appeals Division One, issued its unpublished opinion in this case on July 23, 2007. A copy of that opinion is attached as Appendix A. On August 22, 2007, a petition for review was filed in the Washington State Supreme Court, attached as Appendix B. On April 30, 2008, the court issued a one-page order denying review. A copy of the order is attached as Appendix C. On

, a personal restraint petition was filed within the Washington State Court of Appeals Division One, and was dismissed, based upon an ineffective assistance claim, that the court claimed did not meet an enumerated exception. A copy of the order is attached as Appendix D.

On May 6, 2015, the Washington State Supreme Court denied review. A copy of the order is attached as Appendix E. On April 4, 2018, the United States District Court Western District of Washington State, at Seattle, issued its Order adopting the Report and Recommendations, denying the issuance of the writ, Chief United States District Judge Ricardo S. Martinez presiding.

Justice Martinez, expressing, "with regard tp Claim One, the conflicting case law within the three divisions of the Washington State Court of Appeals, and the lack of clear precedent by the Washington State Supreme Court, surrounding the level of sufficient evidence to prove a firearm operable for purposes of a sentencing enhancement. This court will therefore approve the issuance of a COA, limited solely to the determination of whether under Claim One sufficient evidence existed for any rational factfinder to find beyond a reasonable doubt,' that at the time of the underlying crime Thomas, possessed an operable firearm, for

purposes of the sentencing enhancement. A copy of the Report and Recommendation is attached as Appendix F, Dkt.122, at 13. FN 1.

The Ninth Circuit Court of Appeals upon being briefed, scheduled oral arguments for August 28, 2019, cancelling the proceeding a couple days prior, issuing an unpublished opinion affirming on August 30, 2019. A copy of the unpublished opinion is attached as Appendix G. This petition is timely filed.

JURISDICTION

On August 28, 2019, the Ninth Circuit Court of Appeals affirmed the district court's Report and Recommendation. This Court has jurisdiction pursuant to 28 U.S.C. sections 1257 and 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The Fourteenth Amendment to the United States Constitution provides in relevant part: [N]or shall any state deprive any person life, liberty, or property, without due process of law

B. State Statutory Provisions

Former Revised Code of Washington 9.41.010(1)(2001), provides:

A "firearm" is defined as "a weapon from which a projectile or projectiles may be fired by an explosive such a gunpowder."

FN 1 Citations to "Dkt" denotes opinions or pleadings filed within the district court. Citations to "Dktt" denotes opinions or pleadings filed within the Ninth Circuit.

Former Revised Code of Washington 9.94A.310(3), provides in part:

The following additional time shall be added to the presumptive sentence for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010, and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime.

(a) Five years for any felony defined under any law as a class A felony or with a maximum of twenty years.

(b) Three years for any felony defined under any law as a class B felony or with a maximum of ten years.

(c) Eighteen months for any felony defined under any law as a class C felony or with a maximum sentence of five years.

C. State Rules of Court

Washington Criminal Practice in Courts of Limited Jurisdiction:

Chapter 22 Jury Selection and Instructions: Part VII: Jury Instructions

§ 22.17: Purpose of Instructions Generally, reads:

Jury instructions are intended to furnish guidance to the jury in its deliberations and to the extent permissible, allow the court to aid the jury in reaching a proper verdict. They are used to explain the law of the case, point out the essentials to be proved by one side or the other, and discuss the relationship between the particular evidence admitted and the issues.

~~Washington Criminal Practice in Courts of Limited Jurisdiction:~~

Chapter 22 Jury Selection and Instructions: Part VII: Jury Instructions

§ 22.19: Making Objections to Instructions, reads:

Before instructing the jury the lawyers for each party must be given a copy of the court's proposed numbered instructions, verdict forms, and special finding forms. Counsel for each party must be given the opportunity, outside the presence of the jury to object to giving (or the refusal to give), any instruction or submission of a verdict or special finding form. Any objections to be instructions as well as the grounds for the objections, must be put in the record to preserve review. When making an objection, the party shall state the reasons for the objection, specifying the number, paragraph and part of the instruction to be given or refused. CrR 6.15(c).

Washington Criminal Practice in Courts of Limited Jurisdiction:

Chapter 23 Felony Sentencing: Part II: Overview of Washington State

Sentencing Reform Act of 1981 (SRA) § 23.05 SRA Mandatory Sentence

Enhancements-Overview, reads, in relevant part:

A mandatory sentence enhancement must be pled any proved to a jury beyond a reasonable doubt. In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the Court held, that for purposes of the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to due process, the prosecution must prove to a jury, beyond a reasonable doubt and fact necessary to increase the statutory maximum penalty for the charged crime.

STATEMENT OF THE CASE

In a charging information filed on January 7, 2002, the State charged petitioner Demicko Billie Thomas, in King County Superior Court with one count of first degree robbery and two counts of first degree kidnapping, stemming from an incident alleged to have occurred on December 28, 2002. In an amended information filed on April 15, 2003,

the State included the following additional allegation to each count:

And I, further do accuse the defendant DEMICKO BILLIE THOMAS, at said time of being armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.310(3). FN 2.

The trial court's "to convict" instruction required the State to prove three, separate, essential elements beyond a reasonable doubt:

For purposes of a special verdict the State must prove the defendant guilty of the court to which the special verdict pertains and in addition the State must prove each of the following elements beyond a reasonable doubt.

- (1) That the defendant was armed with a firearm at the time of the commission of the crime; and
- (2) That the firearm was capable of discharging a projectile by an explosive such as gunpowder; and
- (3) That the firearm was operable at the time of the commission of the crime.

Jury Instruction No.32. Appendix H.

The State offered no objection to the elements of the instruction it were required to prove, other than the formatting of the proposed instruction, expressing:

Your Honor, the WPIC's want the special verdict form to be in the nature of interrogatories, rather than the elemental to convict instruction. I, think we should be consistent with the WPIC's in this nature. And we have defined within the instructions, defining the special verdict form of all those elements, or what the State would have to prove. I, do not think they should be in an element form, I, would like them to be consistent with the WPIC's.

FN 2 The defined definition of a "firearm" as expressed in Revised Code of Washington 9.41.010, in conjunction with Former Revised Code of Washington 9.94A.310(3), when filed within a charging information, authorizes the State to seek an enhancement penalty.

When asked by the court, whether the State had any exceptions to the final instructions, as proposed the State replied, "no." RP 15-16, 23, 25-26. FN 3. Appendix I.

The State's failure to object to the essential elements it were required to prove beyond a reasonable doubt, provided the Washington State Supreme Court became the "law of the case." See e.g., *State v. Johnson*, 188 Wn.2d 742, 399 P.3d 507 (2017)(our law of the case doctrine requires the State to prove every element of the "to-convict" instruction beyond a reasonable doubt).

Further, expressing, "in *Musacchio v. United States*, ____ U.S. ____, 136 S.Ct. 709 (2016), the Supreme Court rejected a "law of the case" argument and held, "that Due Process requires only that evidentiary sufficiency claims be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instructions." "Because our "law of the case" doctrine does not rest on federal due process principles, this long standing procedural rule remains intact. *Johnson*, 188 Wn.2d at 747.

Relying upon Washington State's "law of the case" doctrine and the Court's "proof beyond a reasonable doubt" mandate set forth in *In re Winship*, 397 U.S. 358 (1970). Mr. Thomas, contended on direct appeal and within both the federal district court and Ninth Circuit Court of Appeals, that he was deprived of his Fourteenth Amendment right to due process of law. Because as a matter of federal and state law, "the Due Process Clause" protects an accused against conviction, except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he

FN 3 Citations to "RP" denote the Reporter's Trial Transcript, followed by the page reference. Citations to "Br." denote the briefings filed within the Washington State Court's.

is charged. Br.6-12. Appendix J.

The state court of appeals rejected the burden of proof standard set forth in Winship, expressing, "the prosecutor was not required to prove the operability element, and whether the firearm was operable does not matter." Appendix A, at 5.

Mr.Thomas, subsequently filed a personal restraint petition within the Washington State Court of Appeals, praying of the court to reexamine the issue in the interest of justice, and to acknowledge the Winship, proof beyond a reasonable doubt standard. The court declined to do so, "expressing, "Thomas's claims involving insufficiency of the evidence are without merit." Appendix D, at 3-4. Thomas, asserts the State failed to establish that the firearm was operable for purposes of the firearm sentence enhancements. But this claim was raised and rejected in Thomas's first appeal. A petitioner may not renew issues that were considered on direct appeal, unless the interests of justice require relitigation of those issues. Thomas, does not demonstrate that the interests of justice require allowing him to relitigate these claims. Appendix D, at 3-4.

Mr.Thomas, sought review in the Washington State Supreme Court, contending: (1) the lower court's reasoning on direct appeal, i.e., "whether the firearm was operable does not matter, the prosecutor only needed to show that the gun appeared real, rather, than a toy," is inopposite of the explicit jury instruction, which required the prosecution to prove the firearm was "operable" at the time of the commission of the offense, (2) the Washington State Supreme Court has expressed, in regards to the "operability" element, "the State must introduce facts upon which the jury

could find beyond a reasonable doubt the weapon in question meets the definition of an "operable" firearm": A weapon or device from which a projectile may be fired by an explosive such as gunpowder," see State v. Recuenco, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008), (3) Washington State's law of the case doctrine required the State to prove every element of the "to-convict" instruction beyond a reasonable doubt, and (4) federal constitutional due process under Winship, required the State to prove each and every element of the offense before a conviction could be lawful. Br.21-21. Appendix L.

The court commissioner blocked Mr.Thomas's petition for review from being reviewed by the Washington State Supreme Court, to determine whether the Washington State Court of Appeals finding was in conflict with its decision in Recuenco; the court's law of the case doctrine; federal and state due process; and Winship's proof beyond a reasonable doubt, mandate. Expressing, "Mr.Thomas, raised this issue in his first appeal, in challenging the firearm enhancements. The court of appeals there held, "that the evidence was sufficient to show that Mr.Thomas was armed with a real gun." Mr.Thomas, does not show the interests of justice require reexamination of this issue. Appendix E, at 3.

Upon exhausting all of his state remedies Mr.Thomas, filed a writ of habeas corpus within the United States District Court Western District of Washington, at Seattle. In relevant part, contending, in Claim One: That the state court's violated his Fourteenth Amendment right to due process of law. Due process required the State to prove three essential elements of the firearm enhancement allegation, specifically, "that the object used

in the December 28th incident was "operable" " Dkt.70, at 23-28.

Mr.Thomas, subsequently filed a motion under 18 U.S.C. § 3006A, for appointment of counsel. The court granted Mr.Thomas's motion.

Counsel virgously argued: (1) there was insufficient evidence in the record that the firearm was operable, (2) an essential element of Thomas's firearm enhancements was that he possessed a firearm that was operable at the time of the commission of the crime, (3) in addresssing Mr.Thomas's claim the State mistakenly asserts that he does not contend that the prosecution failed to prove the statutory elements, but rather that the jury instructions added an element to the sentence enhancements that required the firearm operable, it argues that this claim is disposed of by *Musacchio v. United States*, which held, "that review of the sufficiency of the evidence does not rest on how the jury was instructed." The State mischaracterizes Thomas's sufficiency claim, (4) under Washington law, before a defendant's sentence can be enhanced the State must prove beyond a reasonable doubt that the defendant was armed with a firearm, the Washington State Supreme Court interprets this language to require a gun to be operable, and (5) as a matter of federal constitutional law a conviction based on evidence that fails to meet the Winship, standard is an independent constitutional violation. Dkt.92, at 2-4.

Counsel further, in respect to the magistrate's Report and Recommendation, vigorously argued: (1) the Recuenco, court's statement that a weapon is not a firearm under statutory language unless it is operable was based directly on the plain statutory language defining "operability" and

firearm. Under this definition the State was required to prove the alleged firearm was operable beyond a reasonable doubt. That was not done here, lower court's cannot simply rewrite the legislature's statutory definition, (2) no gun was admitted into evidence, (3) no expert testified that it was a firearm or that it was operable or could be made operable, (4) no bullets were recovered, (5) no muzzle flashes, and (6) the State provided no evidence that would prove that the object held, by Mr. Thomas, was a firearm as defined by RCW 9.41.010(9), the evidence supporting his firearm enhancements did not meet the Jackson, standard, the absence of any evidence that the firearm was "a weapon or device from which a projectile may be fired by an explosive such as gunpowder made affirmance by the Washington State Supreme Court," is an unreasonable application of Jackson. FN 4. Dkt.94, at 3-6.

Mr. Thomas, upon reviewing counsel's objections to the Report and Recommendation, subsequently filed a motion within the court for permission to file the objections to the Report and Recommendation upon his own behalf. For purposes of objecting to additional issues, thereby, perfecting the record, in the event the filing of a COA were required. The court granted Mr. Thomas's motion

Specific to the issue before the Court, Mr. Thomas, made the following objections: (1) the magistrate failed to apply the Jackson, standard with explicit reference to the substantive elements, as defined by state law, constituting an abuse of discretion, (2) the magistrate's view of what he

FN 4 Jackson v. Virginia, 443 U.S. 307 (1979).

assumed the explicit instruction required the State to prove for purposes of the "operability" element. Should yield to the Winship, proof beyond a reasonable doubt standard, (3) Washington State's law of the case doctrine required the State to prove each and every element of the to-convict instruction, (4) the magistrate's asserted speculation as the basis to form a speculative conclusion, cannot be the basis for subverting the application of the Jackson, standard with explicit reference to the substantive elements as defined by state law, and (5) requested of the court to certify the question to the Washington State Supreme Court as to the "operability" burden of proof requirement. Dkt.108, at 4-13. FN 5.

Consequently, Chief Judge Martinez, adopted the Report and Recommendation, expressing, "as to Claim One, petitioner raises a number of objections." First. Petitioner, argues that the magistrate judge erred by failing to apply Jackson, to evaluate whether the substantive elements of the crime were proven. Second. Petitioner, argues that there was no evidence presented that supports that the gun used in the robberies was either operable or a firearm, in fact. Third. Petitioner, argues that the magistrate erred in not following the law of the case doctrine, requiring the State to prove each and every element named in the jury instructions. Finally. Petitioner, argues that the State court holding, "whether the gun was operable does not matter, the prosecution only needed to show that the gun appeared real, rather, than a toy, was contrary to, and an unreasonable

FN 5 Mr.Thomas, within the scope of his objections to the Report and Recommendation, prayed of the court to certify the question as to the "operability" burden of proof requiremnt, provided, Revised Code of Washington 2.60.020; Louisiana-Pacific Corp v. Asarco, 131 Wn.2d 587, 934 P.2d 685 (1997); Lehman Bros. v. Shein, 416 U.S. 386 (1974). The district court did not make such inquiry. Dkt.108, at 13.

application of federal law." Dkt.122, at 2-3. Appendix F. Holding, the magistrate was not required to determine whether he felt the evidence was sufficient to prove every element beyond a reasonable doubt, only whether any rational trier of fact could have found that it did. Id. at 3.

Further, expressing, as previously asserted, "with regard to Claim One, the conflicting case law within the three divisions of the Washington State Court of Appeals and the lack of clear precedent by the Washington State Supreme Court, surrounding the level of evidence sufficient to prove a firearm is operable for purposes of a sentencing enhancement,' reflects an issue that is debatable amongst jurors of reason.' This court will therefore approve the issuance of a COA, limited solely to the determination of whether under Claim One, sufficient evidence existed for any rational factfinder to find beyond a reasonable doubt that at the time of the underlying crime he possessed an "operable" firearm for purposes of the sentencing enhancement. Id. at 13.

Simply, put the court passed on applying the Jackson, standard with explicit reference to the substantive elements as defined by state law, as well as analyzing the due process violation. Thereby, punting the issue to the Ninth Circuit Court of Appeals.

Upon being granted a COA, the Ninth Circuit reappointed Mr. Thomas counsel. Counsel within the opening brief vigorously argued: (1) at trial the State introduced no bullets from the alleged firearm, (2) no bullets were recovered or examined by experts-neither the firearm, (3) the special verdict instruction required the State to prove as an element of the offense, "that the firearm was operable at the time of the commission of the

crime," Dkt.15, at 3, 5; (4) the court's task under AEDPA, specifically under 28 U.S.C. § 2254(d), is to determine whether the decision of the state court of appeals, upholding Mr. Thomas's conviction was an unreasonable application of Jackson, assessing whether the record evidence is so lacking that habeas relief is merited under Jackson, with explicit reference to the substantive elements of the criminal offense, as defined by state law, Dkt.15, at 18; (5) the Washington State Supreme Court commissioner, unreasonably applied Jackson, because it did not apply Jackson's standard to the elements the State was required to prove in this case, Dkt.15, at 19; (6) Mr. Thomas, may not constitutionally be convicted of a criminal offense, except proof that establishes guilt beyond a reasonable doubt, *Id.*; and (7) under Washington State's law of the case doctrine, the State must prove unnecessary elements included without objection. Dkt.15, at 21.

Further, arguing, in *Johnson*. The Washington State Supreme Court explained, that while Washington has adopted the federal standard for insufficiency review. Washington's law of the case doctrine relies on Washington's own procedural rules of common law, as such the Washington State's rejection of the federal "law of the case" doctrine in *Musacchio v. United States*, is not controlling. Dkt.15, at 21.

The State argued, that *Musacchio*, controls the court's decision making on the issue. Thereby, arguing: (1) the Supreme Court rejected the very argument presented by Mr. Thomas, in *Musacchio*, holding, "the due process clause does not require proof of an additional fact added only by the jury instructions," rather, due process requires only proof of a statutory elements.' Once the evidence proves the statutory elements the due

process requirement for sufficiency is satisfied. In light of *Musacchio*, the state court decision on the issue was not an unreasonable application of clearly established federal law. Dkt.22, at 7; (2) in light of *Musacchio*, the state court adjudication cannot be an unreasonable application of Supreme Court precedent and Mr. Thomas's claim must fail, and (3) Mr. Thomas, tries to distinguish *Musacchio*, suggesting it applies only to cases involving federal law of the case, but this argument misstates the Court's clear holding that resolved the constitutional issue before this Court. The government's failure to introduce evidence of an additional element does not implicate the principles that sufficiency review protects. In light of *Musacchio*, the state court adjudication was not unreasonable. Dkt. 22, at 12-13.

Mr. Thomas's counsel replied, by arguing, "the Jackson, standard must be applied with explicit reference to the substantive elements of the criminal offense, as defined by state law. While the State is correct that *Musacchio*, establishes the constitutional minimum floor requirement. The Washington State Supreme Court has made clear that Washington's law of the case doctrine dictates the elements of a state crime for sufficiency review, under Jackson, and remains intact even after *Musacchio*." Dkt.28, at 1.

In further, arguing, the State cannot rely on *Musacchio*, to supply clearly established federal law for purposes of § of 2254(d)(1), because it postdates the "time of the relevant state court decision," occurring on March 6, 2015, in respect to Mr. Thomas's case.

The Ninth Circuit in total disregard for the Washington State Supreme

Court's precedent set forth in Johnson, and the very fact that Mr. Thomas's state court decision pre-dated the Musacchio, decision. Held, "the jury instructions mistakenly and erroneously required proof the weapon was operable, which was not required under Washington State law." The Supreme Court has held, "when a jury instruction sets forth all the elements of the charged crime, but incorrectly adds one more element, a sufficiency challenge should not be assessed against the erroneously heightened command in the jury instruction, citing, Musacchio." Dkt. 41-1, at 2. Appendix G. The state reasonably concluded the government was not required to prove the weapon was operable, despite the erroneous instruction. Id.

This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

- I. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER THE WASHINGTON STATE SUPREME COURT'S DISAPPROVAL OF THIS COURT'S DECISION IN *MUSACCHIO V. UNITED STATES* IS BINDING ON THE NINTH CIRCUIT AND THIS COURT.

A. Introduction.

This Court has repeatedly made clear, under the AEDPA the federal court's may not second guess state court determinations of state law. *Uttecht v. Brown*, 127 S.Ct. 2218, 2231 (2007). "[I]t is not the province of a federal habeas court to reexamine state court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

In *Bradshaw v. Richey*, this Court held, "a state court's interpretation of state law,' includes one announced on direct appeal of the challenged conviction, and binds a federal court sitting in habeas corpus.' 546 U.S. 74, 76 (2005). See also *Hicks ex rel. Feiock v. Feiock*, 483 U.S. 624, 629 (1998)(federal court's are not at liberty to depart from the state appellate court's resolution of these issues of state law); *Patterson v. New York*, 432 U.S. 197, 210 (1977)(elements of a state crime are necessarily established by state law); *Mullaney v. Wilbur*, 421 U.S. 689, 691 (1975)(state courts are the ultimate expositors of state law and what constitutes the elements of a crime under a state statute); *Martin v. Ohio*, 480 U.S. 228, 235 (1987)(same); *Henderson v. Kibbe*, 431 U.S. 145, 157 (1977); *Cupp v. Naughten*, 414 U.S. 141, 143 (1973).

Despite the Court's authorities in this area, the Ninth Circuit has now, decided to depart from such precedent in its disapproval of the Washington State Supreme Court's disapproval of *Musacchio*, in *Johnson*,

supra. Thereby, applying Musacchio, to Mr. Thomas's case, in spite of the Washington State Supreme Court disapproving of the Musacchio case. In regards to its application to Washington State's "law of the case" doctrine. Such disregard for Washington State Supreme Court's precedent, constitutes an abuse of discretion. See *Cooter & Gell v. Hartmark*, 490 U.S. 384, 406 (1990) (application of the wrong legal standard constitutes an abuse of discretion).

Moreover, it is axiomatic that the Washington State Supreme Court's construction of state statutory law, is binding on the Ninth Circuit, even if the court believed the Washington State Supreme Court's disapproval of Musacchio, was improper. See *City of Chicago v. Morales*, 527 U.S. 41, 61 (1999); *Id.* at 66-68 (O'Connor, J., concurring in part and concurring in the judgment).

Furthermore, state's play the preeminent role of preventing and dealing with crime, and state's possess primary authority for dealing and enforcing the law. *Patterson*, 432 U.S. at 210; *Martin*, 480 U.S. at 232; *Engle v. Issac*, 456 U.S. 107, 128 (1982). Therefore, the Washington State Supreme Court has the power to regulate procedures under which its laws are carried out, and the Court has declared, it will "not lightly" construe the Constitution so as to intrude under the administration of justice by the individual states. *McMillian v. Pennsylvania*, 477 U.S. 79, 85 (1986).

Certiorari is appropriate for three reasons. First. The instruction charged to the jury by the trial court did not omit any elements; did not add any additional elements; did not create an additional burden on the State; was not objected to by the State; and was not mistakenly given or erroneous, as asserted by the Ninth Circuit, within its unpublished opinion. Dktt.41-1, at 2.

In fact, the trial court prior to charging the jury with instruction No.32, had a discussion with the parties as to such:

Mr.Stimmel, FN 6: This is my number 10, its a two page document, for purposes of special verdict the State must have proved the defenadnt guilty on the count to which a special verdict pertains. And in addition, the State must prove the following elements beyond a reasonable doubt. One, that the defendant was armed with a firearm at the time he committed the crime; and two, that the firearm was capable of discharging a projectile by an explosive such as gunpowder; and three, that the firearm was operable at the time of the commission of the crime.

Trial Court: What's the State's position concerning that? It appears to be an accurate recitation of the law.

RP 15-16. Appendix I.

Moreover, throughout the course of discussing the instructions that would be charged to the jury, another discussion ensued about Instruction No.32:

Mr.Stimmel: We had some colloquy earlier today about this, the State was objecting to 32, i.e., my number 10, because it didn't follow the WPIC format, even though it makes more sense. And I, think what--I, don't remember what the court decided earlier this morning, but I, like what the court's done here by including it as number 32, I, think its an appropriate to convict instruction for the special verdict.

Trial Court: I, do to, I'm going to leave it. RP 25. Appendix I.

From a reading of the jury instruction discussions, it is clear that the Ninth Circuit's misguided assertion of the instruction being mistakenly given and erroneous, is incorrect and were not founded upon anything, other than the court's personal views.

FN 6 Mr.Stimmel was Mr.Thomas's trial attorney.

In further support of the trial court finding Instruction No.32, being an accurate recitation of the law. The Washington State Supreme Court has expressed, "the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of an "operable" firearm: A weapon or device from which a projectile may be fired by an explosive such as gunpowder." *Recuenco*, 163 Wn.2d at 437. Such language was also mirrored by the trial court and charged to the jury as Instruction No.31. Appendix K. Thus, the Ninth Circuit did not retain the prerogative to second guess the trial court's determination of state law.

Second. The Washington State Supreme Court has explicitly, expressed, "under the law of the case" doctrine, unless the State objects, the "to-convict" instruction defines the essential elements of the crime and dictates the elements of the crime for purposes of sufficiency. *Johnson*, 188 Wn.2d at 740. In further, expressing, "our law of the case doctrine requires that State to prove every element in the "to-convict" instruction, beyond a reasonable doubt." *Id.* at 762. Our longstanding doctrine remains intact following *Musacchio*. *Id.* at 747. We do not adopt the Supreme Court's conclusion in *Musacchio*.

A state court's interpretation of state law, includes one announced on direct appeal of the challenged conviction, and binds a federal court sitting in habeas corpus. *Bradshaw, v. Richey*. *Supra*. The decision in *Johnson*, was decided upon while Mr.Thomas's writ of habeas was being entertained by the federal court's and should have been acknowledged as binding on the federal court's.

Third. A stark split of authority has developed in the state court's and the Ninth Circuit, regarding the application of Musacchio, as to whether Musacchio, applies to Washington State's "law of the case" doctrine and its relevance to Washington State sufficiency claims. As previously asserted, Washington State disapproves of the Musacchio, decision. While the Ninth Circuit believes that Musacchio, applies to Washington State's "law of the case" doctrine and Washington State sufficiency claims. Despite, the Washington State Supreme Court, conveying, "Musacchio does not."

Since this sharp split of authority has arisen, it cannot be resolved and/or harmonized without the Court's intervention. Thus, in order to correct the Johnson, and Musacchio, conflicts among both jurisdictions. The Court should grant the Petition for Writ of Certiorari.

II. WHETHER THE FOURTEENTH AMENDMENT REQUIRES EACH
AND EVERY ELEMENT OF A CHARGED OFFENSE BE
PROVEN BEYOND A REASONABLE DOUBT.

A. Introduction.

District Court Chief Judge Martinez, as previously asserted, expressed, in part, "with regard to the sufficiency claim, the conflicting case law within the Washington State Court of Appeals, and the lack of clear precedent by the Washington State Supreme Court, surrounding the level of sufficient evidence to prove a firearm operable for purposes of a sentencing enhancement." Is a profound statement when you take into account that Washington State is charging, convicting and sentencing defendant's to thousands of years in prison, founded upon a deadly weapon or firearm allegation. In spite of

there being no precedent, surrounding the level of sufficient evidence to prove a firearm operable for purposes of a sentencing enhancement.

The Court should find such to be very problematic. As the Court in *Winship*, expressed, "the Due Process Clause requires a State to prove beyond a reasonable doubt, every element of the charged offense." 397 U.S. at 365. Establishing, in *Winship*, that the Due Process Clause of the Fourteenth Amendment guarantees a defendant the right not to be convicted, unless the jury finds "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*

Washington State's failure to recognize this basic constitutional requirement, has resulted in thousands of defendant's being sentenced to thousands of years in prison, without the State meeting its burden of proof requirement, as set forth in *Winship*. Even more troubling, upon a defendant challenging his or her conviction based upon insufficiency of evidence. There exist no precedent from the Washington State Supreme Court, and conflicting case law from three separate state court of appeals, who all disagree upon every aspect of Washington State law. And with neither willing to acknowledge the Court's "proof beyond a reasonable doubt," mandate, set forth in *Winship*.

However, in 2008, one of the court's decided to adhere to the "proof beyond a reasonable doubt" mandate, which to the other court's was repudiated. As in *State v. Pierce*, 155 Wn.App. 701, 714, 230 P.3d 237, 244-45 (2008). In his personal restraint petition he argued that the trial court erred by imposing a sentence for a firearm enhancement rather than a deadly weapon enhancement, because the State charged him by information with being

"armed with a deadly weapon." Id. at 714.

The court agreed that the interest of justice required reconsideration, but on slightly different grounds. The court, citing to Recenco, explained that "to uphold a firearm enhancement, the State must present the jury with sufficient evidence to find a firearm "operable" under this definition." Id. (citing to Receunco, 163 Wn.2d at 437).

Because there was "no evidence that the firearm with which Pierce was armed was capable of firing a projectile[,]" the court remanded to the superior court with directions it dismiss the firearm enhancements and resentence Pierce, without them. 155 Wn.App. at 714.

And in responding to the State's argument that it did not have to introduce the weapon to support a firearm enhancement, the court said that "[t]his may be true when there is other evidence of operability, such as bullets found, gunshots heard, or muzzle flashes" and that although, the evidence was sufficient to prove an element of a deadly weapon, "where proof of operability is not required, the evidence here is insufficient to support the imposition of a firearm sentencing enhancement, where proof of operability is required." Id. at 714, n.11.

Similarly, here, in Mr. Thomas's case. There was no gun admitted into evidence; no expert testified that it was a "firearm"; the alleged gun was never tested; no gun was ever fired; no bullets were recovered, nor were there any muzzle flashes. The State presented only testimony from two witnesses, both of whom conveyed having no experience with firearms and thus, could only speculate as to whether the object was a gun-in-fact. RP 317-318, Appendix L; RP 37, Appendix M.

However, in speaking directly to the testimony, one witness conveyed, "she knew nothing about guns and described the gun she thought she saw as a "revolver" even though it could not have been a revolver as it lacked a cylinder." RP 317-318. Appendix L. The other witness conveyed, "she had never seen a gun in my life." RP 37, Appendix M. Thus, in light of the afore-mentioned how then would a "commonsense understanding" of Winship, result in a state court concluding that the State has met its burden of proving each and every element of Instruction No.32? Certiorari is appropriate for four reasons.

First. To determine whether *Musacchio*, is applicable to Mr. Thomas's sufficiency claim. And if so, harmonize the Court's precedent with the Washington State Supreme Court's precedent set forth in *Johnson*. However, if *Musacchio*, is not applicable, remand with instructions to the Ninth Circuit to grant a writ of habeas corpus, with respect to Mr. Thomas's sufficiency claim. As the State argued to the Ninth Circuit that because of *Musacchio*, the state court decision was not an unreasonable application of clearly established federal law, and that the adjudication was not unreasonable. Such rationale if the Court finds *Musacchio*, is inapplicable to Mr. Thomas's case, due to the Washington State Supreme Court's decision in *Johnson*. Then the State's argument must fail and remand is appropriate.

Second. This case involves the finding of what standard of sufficiency of evidence will apply, in respect to Washington State's "law of the case" doctrine, and the Court's view of the "law of the case" doctrine.

Both of which need to be harmonized for present and future purposes of Washington State defendant's who may potentially present sufficiency claims within the federal courts. Even more, to guide federal courts on how Musacchio, is, or is not to be applied, in regards to Washington State or other State's sufficiency claims. Whereas, as demonstrated, a State disapproves of the Court's decision in Musacchio.

Third. Neither the district court or the Ninth Circuit applied the Jackson, standard with explicit reference to the substantive elements of the criminal offense, as defined by state law. Rather, means-ends-reasoning was employed, to render a decision, i.e., (anti-defendant interpretations of law to uphold an unconstitutional conviction). Constituting a miscarriage of justice.

Fourth. The instruction was not mistakenly given or erroneous; was not ambiguous; did not omit an element or include an additional element. This is a case where the state and federal courts are proclaiming: Screw applying the Jackson, standard with explicit reference to the substantive elements of the criminal offense; Screw the jury instructions; Screw the elements of the charged offense; Screw the Winship and Jackson standard; Screw due process; and Screw the Fourteenth Amendment guarantees.

Effectively abetting the State in evading its burden of proof requirement, and thus, lowering the State's burden of proof. If such abetting is allowed to continue, such will erode the Court's precedent; the Constitution and Our Nations rule of law. This Court should grant Mr.Thomas's Petition for Writ of Certiorari, as thousands of defendant's are serving thousands of years in Washington State prisons, founded upon deadly weapon

and firearm enhancement allegations, where the State was allowed to evade its burden of proof.

Mr. Justice Frankfurter:

"It is the duty of government to establish guilt beyond a reasonable doubt, this notion-basic in our law and rightfully one that boasts of a free society-is a requirement and a safeguard of due process of law in the historic, procedural content of due process."


LeLand v. Oregon, 343 U.S. 790, 802-803 (1952)(dissenting opinion).

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

DATED: November 27, 2019.

Respectfully Submitted,

By:  Mr. Demicko Billie Thomas

Pro Se Petitioner